APPEAL NO. 93394

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on April 28, 1993, (hearing officer) presiding. The issues at the hearing were the appellant's (claimant herein) correct impairment rating and whether the claimant should be allowed to change his treating doctor. The hearing officer found that claimant had a five percent whole body impairment based upon the assessment of the designated doctor and that the claimant should be allowed to change treating doctors.

Claimant appeals the determination of the hearing officer as to impairment rating, contending that the opinion of the designated doctor has been overcome by the great weight of the medical evidence and that his inability to return to his previous employment proves he has more than five percent physical impairment. The respondent (carrier herein) replies that the designated doctor's assessment of impairment, which is entitled to presumptive weight, is not overcome by the great weight of medical evidence, but is in fact supported by all the medical evidence, and that the claimant failed to timely dispute the impairment rating of the treating doctor.

DECISION

Finding no reversible error in the record, and sufficient evidence to support the decision of the hearing officer, we affirm.

Most of the facts of the case are uncontested and the evidence is generally summarized in the Statement of Evidence found in the Decision and Order of the hearing officer which is adopted for purposes of this decision. Briefly summarizing, it is uncontested that the claimant was injured in the course and scope of his employment as a construction rker in June 1991. The claimant was originally treated by a Dr. C, but (Dr. K), a (city) neurosurgeon, became his treating doctor. Dr. K commenced a course of conservative treatment and ordered a number of diagnostic tests.

The claimant, a non-English speaker, testified through an interpreter that Dr. K told him that he had twenty-five percent impairment, but declined to state this in writing, suggesting instead he would be happy to discuss the claimant's impairment with anyone who questioned it. The claimant also stated that at some point Dr. K told him that the insurance company was putting pressure on Dr. K and suggested that claimant get another doctor. Dr. K apparently certified that the claimant reached maximal medical improvement (MMI) in March 1992 with a five percent impairment rating.

Claimant testified he received Dr. K's certification of MMI and impairment rating in April and went to the Texas Workers' Compensation Commission (Commission) on May 1, 1992, where he disputed Dr. K's impairment rating. The claimant then returned to Dr. K, who ordered a repeat MRI and after receiving the results issued a Report of Medical Evaluation (TWCC-69) certifying MMI on June 11, 1992, and assessing a five percent

impairment rating.

On February 4, 1993, the claimant saw (Dr. T), a orthopedic surgeon and a doctor selected by the Commission to be the designated doctor. Dr. T certified MMI as of February 4, 1993 and assessed a five percent impairment rating.

The claimant testified that he disagreed with Dr. T's impairment rating because the examination he received from Dr. T was brief, and while the claimant brought extensive medical records from his prior treatment, Dr. T stated his agreement with the impairment rating assessed by Dr. K before he had time to thoroughly examine these records. While in both his testimony and his request for review the claimant complains about the findings of MMI by both Drs. K and T, he testified at the hearing and states on appeal that at an earlier hearing he had entered into an agreement with the carrier as to the date of MMI. The benefit review conference report states that both parties agreed to MMI at a previous contested case hearing. The facts surrounding this agreement or even the date of MMI agreed upon are not reflected in the record before us. In fact we feel that this record generally would have much easier to review had the hearing officer attempted to clarify some of the facts by developing the record through examination of witnesses and requesting stipulations regarding uncontested matters.

The claimant requested permission from the Commission to change treating doctors. This request was granted by the hearing officer and has not been appealed by either party. Thus the question before us on appeal is whether the hearing officer's finding a five percent impairment rating is legally correct and supported by the evidence.

Article 8308-6.34(e) provides that the contested case hearing officer, as the fact finder, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility that is to be given the evidence. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. When reviewing a hearing officer's decision for factual sufficiency of the evidence, we must consider and weigh all the evidence, and we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993; Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Article 8308-4.26(g) of the 1989 Act provides in relevant part:

> . . . If the commission selects a designated doctor, the report of the designated doctor shall have presumptive weight and the commission shall base the impairment rating on that report unless the great weight of the other medical evidence is to the contrary, in which case the commission shall adopt the impairment rating of one of the other doctors.

The claimant first argues that the opinion of the designated doctor in the present case is contrary to the great weight of the medical evidence because the examination was brief and the designated doctor did not adequately examine his medical records. It is the duty of the trier of fact to determine the weight to be given to the evidence of the inadequacy of a medical examination as with all other evidence. We do not find the hearing officer's decision in this regard to be against the great weight and preponderance of the evidence. *See* Appeal No. 92255, *supra*.

The claimant argues that the second reason that the opinion of the designated doctor was contrary to the great weight of the medical evidence is because he contends that Dr. K, his treating doctor, told him he had a twenty-five percent impairment. This is in contradiction to the TWCC-69 filed by Dr. K which stated that he only found five percent impairment. There is a question as to whether this hearsay statement by the claimant constituted any evidence in regard to impairment. But assuming arguendo that it did, as the finder of fact, the hearing officer resolves conflicts in the testimony and in the evidence. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Further we have held that the report of no other doctor, including that of the treating doctor, is to be given the presumptive status accorded to the report of the designated doctor. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992.

Finally, the claimant states that the impairment rating of the designated doctor is against the great weight of the evidence because both Drs. K and T have told him that he has serious back problems and will not be able to return to his previous work. This back condition is borne out by the medical evidence. Dr. T, the designated doctor, states in his report of February 4, 1993:

> I do not feel this individual is qualified to resume unrestricted laboring exertional activities in future employment. Specifically, I believe that he should be considered for restriction from lifting greater than 50 lbs. above the waist, nonrepetitive bending, stooping, or squatting. Obviously with his training at this point in time, he will require further job training and/or rehabilitation for alternate employment with the above noted limitations.

However, under the 1989 Act, compensation is based upon the impairment rating and not upon a loss of wage earning capacity. Article 8308-4.26; 1 J. Montford, Barber & Duncan, A Guide to Texas Workers' Comp Reform § 4.2b(1) (1991). In fact, as one of the architects of the 1989 Act, Senator John Montford stated in his treatise on the 1989 Act, A Guide to Texas Workers' Comp Reform, § 4B.26 at 4-105 (1991), "[a]bility to obtain and retain employment is not relevant to a determination of impairment."

Finally our holding renders moot the carrier's argument that the claimant did not

timely dispute his impairment rating. In the present case in light of the statutory presumption to be given to the designated doctor's findings under Article 8308-4.26(g), and following the legislatively mandated definition of impairment of the 1989 Act, we cannot say that the hearing officer's decision as to impairment was erroneous.

For the foregoing reasons, we affirm the decision of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge